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11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 OAKLAND DIVISION

15 LORILLARD TOBACCO COMPANY, a  
16 Delaware corporation,

17 Plaintiff,

18 v.

19 TENDERLOIN GROCERY, a business  
entity; and AHMED SAID, an individual;  
20 and DOES 1-10 INCLUSIVE,

21 Defendants.

22  
23 AND RELATED COUNTERCLAIMS.

CASE NO. C 05-3123 CW

**LORILLARD TOBACCO COMPANY'S  
REPLY TO COUNTERCLAIMS**

24  
25 **REPLY TO COUNTERCLAIM**

26 Plaintiffs and Counterdefendant Lorillard Tobacco Company responds as follows to the  
27 Counterclaim of Defendants and Counterclaimants Ahmed Said and Tenderloin Grocery  
28 (collectively "Counterclaimants"):

-1-

**FIRST COUNTERCLAIM**

**(Breach of Contract)**

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2  
3 1. Responding to paragraph 1, Lorillard admits that it does business within this  
4 judicial district and sells NEWPORT® brand cigarettes within this judicial district, but denies the  
5 remaining allegations of this paragraph.

6 2. Lorillard admits the allegations of paragraph 2 on information and belief.

7 3. Responding to paragraph 3, Lorillard admits that it entered into an agreement,  
8 avers that the Agreement speaks for itself, and otherwise denies the remaining allegations of this  
9 paragraph.

10 4. Lorillard denies the allegations of paragraph 4.

11 5. Lorillard denies the allegations of paragraph 5.

12 6. Lorillard denies the allegations of paragraph 6.

13 7. Lorillard denies the allegations of paragraph 7.

14 8. Lorillard denies the allegations of paragraph 8.

**SECOND COUNTERCLAIM**

**(Unfair Business Practices – Cal. Bus. & Prof. Code §§ 17200 et. seq.)**

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16  
17 9. Responding to paragraph 9, Lorillard incorporates by reference all of the preceding  
18 paragraphs as if fully set forth herein.

19 10. Lorillard denies the allegations of paragraph 10.

20 11. Lorillard denies the allegations of paragraph 11.

21 12. Lorillard denies the allegations of paragraph 12.

22 13. Lorillard denies the allegations of paragraph 13.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

**(Failure to State a Claim)**

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24  
25 The Counterclaim, and each claim therein, fails to state facts sufficient to state a claim.

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**SECOND AFFIRMATIVE DEFENSE**  
**(Failure to Meet Contractual Obligations)**

The Counterclaim is barred because of Counterclaimants' failure to meet requirements set fourth in any alleged contract.

**THIRD AFFIRMATIVE DEFENSE**  
**(Excused Performance)**

To the extent Lorillard did not perform alleged obligations, if any, then Lorillard's performance was excused by reason of Counterclaimants' own failures of performance and other wrongs.

**FOURTH AFFIRMATIVE DEFENSE**  
**(Justification/Privilege)**

Lorillard's actions as alleged in the Counterclaim were reasonable, necessary, justified and privileged.

**FIFTH AFFIRMATIVE DEFENSE**  
**(Failure to Mitigate)**

Counterclaimants failed to mitigate alleged damages, if any, which they claim to have sustained, and recovery should be barred or diminished accordingly.

**SIXTH AFFIRMATIVE DEFENSE**  
**(Estoppel & Waiver)**

The Counterclaim is barred by the doctrines of estoppel and waiver.

**SEVENTH AFFIRMATIVE DEFENSE**  
**(Unjust Enrichment)**

Counterclaimants will be unjustly enriched if Counterclaimants are allowed to recover any or part of the damages alleged in the Counterclaim.

**EIGHTH AFFIRMATIVE DEFENSE**  
**(Substantial Compliance)**

Counterclaimants' claims against Lorillard are barred by the doctrine of substantial compliance.

**NINTH AFFIRMATIVE DEFENSE**  
**(Statute of Frauds)**

The Counterclaim is barred, in whole or in part, by the statute of frauds.

**TENTH AFFIRMATIVE DEFENSE**  
**(Unclean Hands)**

The Counterclaim is barred, in whole or in part, by the doctrine of unclean hands.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Damages Barred)**

The damages sought within the Counterclaim, including punitive or exemplary damages, are barred by the applicable statutes and law.

**TWELFTH AFFIRMATIVE DEFENSE**  
**(Reservation of Defenses)**

Lorillard reserves the right to assert additional defenses as may be developed further as this matter progresses.

**PRAYER FOR RELIEF**

WHEREFORE, Lorillard prays for relief as follows:

1. That the Court enter judgment in favor of Lorillard and against Counterclaimants on the Counterclaims;
2. That the Counterclaims be dismissed with prejudice;
3. That the Court order Counterclaimants to pay Lorillard its costs and attorney's fees; and
4. That the Court grant such other and further relief as the Court deems just and proper under these circumstances.

Dated: October 17, 2005

DLA PIPER RUDNICK GRAY CARY US LLP

By 

Thomas A. Burg  
Attorneys for Plaintiff  
Lorillard Tobacco Company